No. 17-571

IN THE

Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Petitioner,

v.

WALL-STREET.COM, LLC AND JERROLD D. BURDEN,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh
Circuit

BRIEF OF AUTHORS GUILD AND OTHER ARTISTS' RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AUTHORS GUILD AND OTHER ARTISTS' RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Supreme Court of the Unites States, *amici curiae* The Authors Guild, Inc. and 12 other artists' rights organizations, respectfully submit this brief in support of the request of petitioner Fourth Estate Public Benefit Corporation, that the May 18, 2017 Order of the United States Court of Appeals for the Eleventh Circuit be reversed.[1]

INTEREST OF *AMICI CURIAE*

Founded in 1912, the Authors Guild, Inc. (the "Guild") is a national non-profit association of approximately 10,000 professional, published writers of all genres including periodicals and other composite works. The Guild counts historians, biographers, academicians, journalists, and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amici curiae* made such a monetary contribution. The Clerk has noted Petitioner's and Respondents' blanket consent to *amicus curiae* briefs, dated July 24, 2018 and July 25, 2018, respectively, on the docket.

copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

The Guild's members are the creators on the front line. They file registrations, police and enforce their intellectual property rights, send demand letters to those violating such rights – and, if all else fails – they seek intervention from the federal judiciary to enjoin infringers who violate the Copyright Act and to obtain just compensation for the fruits of their labor.

The various artists' rights organizations who join this brief support, and have an interest in the theory, law and practice of copyrights, property rights, and contracts.[2] The organizations have no other stake in the outcome of this particular case, but are interested in ensuring that copyright law

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[2] The organizations are American Photographic Artists, American Society of Media Photographers, Dramatists Guild of America, Graphic Artists Guild, Horror Writers Association, National Association of Science Writers, National Press Photographers Association, North American Nature Photography Association, Professional Photographers of America, Science Fiction and Fantasy Writers of America, Songwriters Guild of America, Inc., and Textbook & Academic Authors Association. Their descriptions are included in the Appendix to this brief.

develops in a way that best promotes creativity, innovation and competition throughout the world.

SUMMARY OF ARGUMENT

As a matter of law and policy, the Court should interpret the Copyright Act in favor of a reading that supports authors (in the broad sense, including all creators and rightsholders). Such a reading is particularly important in an era where the ability to make a living as a creator is increasingly difficult, due in large part to widespread infringement, predominantly online, and the limited means available to curtail such infringement. As the incentives to create are diminished, so is society's ability to realize the fundamental goal of the Copyright Act: to foster creation and innovation in writing, the arts, and countless other forms of expression that benefit it as a whole.

While infringement has ballooned, so has the processing time of applications at the U.S. Copyright Office. It now can take up to 16 months for an online application and 28 months for a paper application.

Under an interpretation of Section 411(a) of the Copyright Act that requires authors to wait to enforce their rights until the Copyright Office has fully processed the registration of the infringed work, the delay can have a monumental impact on an author's ability to protect the fruits of her creative endeavors.

As Petitioner argues, under a correct reading of the Copyright Act, Section 411(a) is satisfied upon the filing of a complete application for registration. The language of the statute itself, particularly when read in conjunction with other provisions in the same chapter of the Act, including Sections 408, 410, and 412, clarifies that the date a registration is "made" is the date on which the complete application (with the deposit copy and fee) are deposited with the Copyright Office. A reading to the contrary would make Section 411(a) an outlier within Chapter 4 of the Copyright Act.

Such a contrary reading would cause hardships to authors, effectively barring them from the courthouse in many cases. An author may have to wait for well over a year from submission to pursue infringing activity. Even where expedited registration is possible, the filing fee of $800 per work is prohibitively expensive for many authors – especially if multiple works are infringed. As a result, an author may have to make the choice of spending more to register the infringed work than she was paid to create it, or of waiting without recourse for many months while her works continue to be infringed. Further, the "registration" interpretation forces an interpretation of other sections of the Copyright Act that curtail the ability of infringed authors to bring suit and be made whole, including to recover statutory damages and attorneys' fees, as well as injunctive relief.

This result cannot be what Congress intended when it required that "registration of the copyright claim [be] made" prior to filing a claim for infringement. As a matter of law and policy, the Court should rule in favor of finding that Petitioner's view is correct.

ARGUMENT

I. THE COURT SHOULD CONSTRUE THE STATUTE IN ACCORDANCE WITH THE PURPOSES OF THE COPYRIGHT ACT AND THE ACT'S PLAIN TEXT.

A. Authors Depend on Copyright for Their Livelihood and to Protect Their Constitutional Rights.

> "Literature is my Utopia. Here I am not disenfranchised. No barrier of the senses shuts me out from the sweet, gracious discourses of my book friends. They talk to me without embarrassment or awkwardness."
>
> HELEN KELLER, THE STORY OF MY LIFE (Dover Publications 2012) (1903).

> "Writing a book is a horrible, exhausting struggle, like a long bout of some painful illness."
>
> GEORGE ORWELL, WHY I WRITE (Penguin Books 2015) (1946).

The goal of copyright law in the United States, as enshrined in the Constitution, is "[t]o promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. The Copyright Act achieves this goal by creating economic incentives for authors (including writers, dramatists, photographers, and other artists, like the members of *amici*), to release the products of their creative endeavors to the public. *See Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) ("[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones."); *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

The life of a creator is not easy. Aside from the deadlines, writer's block, and constant scrutiny – authors face an uphill battle to make sustainable wages. For example, a 2015 Authors Guild study shows that the average income of a full-time writer decreased 30% from 2009 to 2015: from $25,000 a year, to $17,500. *See* THE AUTHORS GUILD, The *Wages of Writing: Key Findings from the Authors Guild* (2015), https://www.authorsguild.org/industry-advocacy/the-wages-of-writing/. Specifically, full-time writers with more than 15 years of experience saw a 67% drop from $28,750 a year to $9,500; part-time authors saw a 38% decrease in the average

income, from $7,500 a year to $4,500. *Id.* Creators in other genres do not fare much better. Comparing salary statistics (adjusted for inflation) shows that salaries for illustrators have remained stagnant for the fifteen years from 2003 to 2018. GRAPHIC ARTISTS GUILD, GRAPHIC ARTISTS GUILD HANDBOOK: PRICING & ETHICAL GUIDELINES (Graphic Artists Guild, 15th ed. 2018).

The stagnating and even plummeting incomes of creators "is not a problem. It's not even a crisis. It's a catastrophe . . . [and when a creator] can't make a living and switches to working in another field, an entire lifetime" of works are never made.[3]

The Founders realized that the intellectual and artistic labor of such creators was crucial to the nation, but that without the protection of legal remedies, there was little incentive for them to pursue their crafts. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'"). This is in part because financially successful creative works are often brought forth

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[3] Doug Preston, *Why is it so Goddamned Hard to Make a Living as a Writer Today?*, AUTHORS GUILD BULLETIN (Spring/Summer 2017), https://www.authorsguild.org/the-writing-life/why-is-it-so-goddamned-hard-to-make-a-living-as-a-writer-today/.

only intermittently over lifetimes spent honing craft. For every successful creative endeavor, there are innumerable failures, all requiring equal hardships.

While creative work comes at a high cost for authors, it can be stolen by copyright infringers at bargain prices. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 961 (2005) ("deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft"); William Landes and Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 326 (1989) ("While the cost of creating a work subject to copyright protection – for example, a book, movie, song, ballet, lithograph, map, business directory, or computer software program – is often high . . . once copies are available to others, it is often inexpensive for these users to make additional copies."); S. REP. NO. 105-190 at 8 (1998). Copyright law attempts to correct this imbalance by placing a heavy financial and legal risk on such infringers.

As the former president of the Authors Guild, Scott Turow, has put it, copyright law has been one of history's greatest public policy successes for over 300 years, because the markets created by copyright laws "have for hundreds of years encouraged authors here and abroad to spend countless hours writing books that they hope readers will value and the marketplace will reward." *Targeting Websites Dedicated to Stealing American Intellectual Property:*

Hearing Before the S. Comm. on the Judiciary, 112th Cong. 7-9 (2011) (testimony of Scott Turow, President of the Authors Guild).

But the statutory balance has tipped away from authors in recent years. The sinister downside of the digital era's exponential advancements in information distribution is that not only has the marginal cost of infringement come down to almost nothing, but the speed at which such theft can take place has become the mirror image of long-toiling author. *See Grokster*, 545 U.S. at 923; *A & M Records Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1019 (9th Cir. 2001).

For example, the combination of the proliferation of e-books and the speed at which print books also can be obtained online has sped up the market for new books. Many books can even be ordered prior to their publication date and received on the publication date. At the same time, the prevalence of e-books has made it easier to illegally copy books. Counterfeit copies can be made in the blink of an eye, creating a multitude of new counterfeit markets, which are growing every day.

As another example, a photojournalist has the capability to transmit an image within moments of taking it. These images – which may document events of great national and international importance, including political campaigns, wars, breaking news and sports – are easily infringed.

Because of the enormous public appetite in the subject matter, within seconds of its creation, such an image may be downloaded and unlawfully re-posted many times, becoming "viral" – and virally infringed – in short order.

This digital revolution has had a measurable effect not only on authors' incomes, but also on the entire economy. It is estimated by various government and private sector experts that intellectual property theft – including U.S.-produced digital content such as music, film, photography, and books (the types of works produced by members of the *amici*) – costs the U.S. economy over $100 billion per year. *See A Section White Paper: A Call for Action for Online Piracy and Counterfeiting Legislation*, 2014 A.B.A. SEC. OF INTELL PROP. L., *available at* http://perma.cc/9GCY-3D3D.

It is in this context that the Respondents' arguments and the decision below of the Eleventh Circuit, along with a similar decision of the Tenth Circuit, *see La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195 (10th Cir. 2005) *abrogated in part by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), are pernicious. Because as the time to publish, distribute, purchase and consume both legitimate and infringing copies of works has vastly accelerated, the time required for the Copyright Office to process authors' registrations has ballooned. Processing times have gone from an

average of 82 days in 2005 to an average of seven to 16 months in 2018. U.S. Copyright Office, *Annual Report of the Register of Copyrights* 47 (2009), *available at* https://www.copyright.gov/reports/annual/2009/ar2020.pdf ("2009 Annual Report"). *See also* U.S. Copyright Office, "Registration Processing Times" (reporting average processing times of 7 to 16 months of registration materials), https://www.copyright.gov/registration/docs/processingtimes-faqs.pdf.

Indeed, in the case *sub judice*, the Copyright Office took the upper range of those averages, 16 months, to act on Petitioner's registration. *See* U.S. Inv. Br. App. 3a-4a. Such delays are dangerous for authors whose livelihoods depend on time-sensitive copyright remedies.

B. Plain-Text Reading of the Copyright Act Supports the Position that Authors, not the Copyright Office, Must Act to Register Works Before Suit.

"Hell is truth seen too late."

> THOMAS HOBBES, LEVIATHAN (Oxford University Press 1996) (1651).

The members of *amici*, many of whom are writers and are habitually concerned with words, note that the issue in the case revolves around the

interpretation of the language in the Copyright Act, setting forth as a prerequisite for an infringement lawsuit that, "registration of a copyright claim has been made." 17 U.S.C. Section 411(a). Does it require, as Petitioner and *amici* argue, that the *author* has made a registration (*i.e.*, filed a complete application), or instead, as Respondents argue, does it require that the *Copyright Office* has completed processing of that registration and issued a registration certificate?

Amici agree with Petitioner that the word "registration" normally can refer either to the action of a registrant or a registrar. *See, e.g.*, New Oxford American Dictionary 1470 (3d ed. 2010) (definition of "registration" as "the action or process of registering or of being registered"). However, *amici* also note that Section 410 of the Act, entitled "Registration of Claim and Issuance of Certificate" resolves the quandary by unambiguously stating that the effective date of registration is when the application is received in the Copyright Office. 17 U.S.C. § 410(d).[4] Indeed, countless authors have long relied on such an interpretation.

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[4] Section 410 further clarifies that authors do not have to wait for the Copyright Office to make a determination on the sufficiency of their filings, because a "court of competent jurisdiction" can determine that such materials were acceptable when they were deposited. *Id.*

That statutory text should be the end of the analysis. The Court has "stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred*, 537 U.S. at 212. Here, Congress has already spoken. Section 410(d) cannot be read to mean that the earlier date is the effective date for some purposes and not others, when it is clearly intended to establish the key date regarding registrations in all five consecutive Sections of the Act that address registration, Sections 408 through 412.

For example, Section 408, the section that defines copyright registration, does not refer to any requirement that the Copyright Office approve an application or materials. 17 U.S.C. § 408(a). It simply states that registration is an author's submission of the application, deposit, and fee (and makes clear that registration is not a condition of copyright protection). *Id.*

Like Section 411, Section 412 makes registration (or preregistration) a prerequisite – but for certain remedies, rather than for the ability to bring a suit. Specifically, registration must be made prior to the infringement of a work or within three months of its publication to be eligible for an award of statutory damages and attorney's fees. 17 U.S.C. § 412. Like Section 411, this reflects Congress's goal of encouraging registration. *Golan v. Holder*, 565 U.S. 302, 314 n.11 (2012). But for authors, this language

also allows flexible access to the most invaluable economic tools that protect the results of their labor.

Section 412's exception, or grace period, specifically refers to Section 410's "effective date" rule – meaning that the act required within three months is a completed application by the author. *See* 17 U.S.C. §§ 412 & 412(2). This interpretation of Section 412 is consistent with canons of statutory interpretation, well-established policy goals, and the expectations of the industry and all parties involved. Indeed, neither the Copyright Office nor any court has ever adopted a contrary rule that the Copyright Office must have processed the application.

However, because the nearly identical language in Sections 411 and 412 should be interpreted the same way, Respondents' reading of Section 411 creates tension with this universally-accepted interpretation of Section 412. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 536 (2013) (presuming that a statutory phrase "carr[ies] the same meaning when [it] appear[s] in different but related sections").

Under such a reading of Section 412, (again, which no court has adopted or should adopt), it would be impossible for claimants to take advantage of the three-month grace period, since, as demonstrated *supra* p. 11, it takes an average of seven to 16 months to receive a registration certificate, longer than the three months that would

be allowed for registration to "be made." *See Agence France Presse v. Morel*, No. 10 Civ. 2730 (AJN), 2014 WL 3963124, at *13 (S.D.N.Y. Aug. 13, 2014) (awarding significant statutory damages where plaintiff submitted registration materials within the three-month safe harbor). This would effectively strike the grace period, robbing authors of the most powerful protections and remedies available to them (*see infra* pp. 21-24).

Preregistration is not a solution to these problems. Only specified works – for example, advertising or marketing photographs – can be preregistered. *See* 37 C.F.R. § 202.16. Furthermore, preregistration is meant to be permissive, not mandatory. If this Court adopts the Eleventh Circuit's approach, costly preregistration will effectively become mandatory, which will add to the burden on authors to produce works. *See* 37 C.F.R. § 201.3(c) ($140 cost of pre-registration application, four times the standard fee).

II. ADOPTING THE ELEVENTH CIRCUIT RULE WILL CAUSE SIGNIFICANT ECONOMIC HARDSHIP ON AND LOSS OF RIGHTS FOR AUTHORS.

> "Estragon: Charming spot.
> (He turns, advances to front, halts facing auditorium.) Inspiring prospects. (He turns to Vladimir.) Let's go.

> Vladimir: We can't.
> Estragon: Why not?
> Vladimir: We're waiting for Godot."
>
> SAMUEL BECKETT, WAITING FOR GODOT (Grove Press 2011) (1952).
>
> "I imagined a labyrinth of labyrinths, a maze of mazes, a twisting, turning, ever-widening labyrinth that contained both past and future and somehow implied the stars."
>
> JORGE LUIS BORGES, THE GARDEN OF FORKING PATHS (Penguin 2018) (1941).

Any bar to the courthouse doors that does not center on the actions of authors themselves, and depends on the timing of bureaucratic action entirely outside of their control, will cause significant economic hardship and the loss of rights for such authors. *See, e.g., International Kitchen Exhaust Cleaning Ass'n. v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (registrant approach: "To best effectuate the interests of justice and promote judicial economy, the court endorses the position that a plaintiff may sue once the Copyright Office receives the plaintiff's application, work, and filing fee."); *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1056-57 (C.D. Cal. 2004) (registration certificate approach:

"The Court shares the sentiments of the *Ryan* court that, while this is an 'inefficient and peculiar result,' 'the Court is not free to redraft statutes to make them more sensible or just.'") (quoting *Ryan v. Carl Corp.*, No. 97 Civ. 3873 (FMS), 1998 WL 320817, at *3 (N.D. Cal. June 15, 1998)) (internal citation omitted).

A. The Copyright Office Admits There Are Impediments to an Author's Ability to Timely Obtain a Registration Certificate.

The Eleventh Circuit's decision effectively puts copyright owner's profits at the mercy of the Copyright Office, and its action – or failure to act – in response to registration materials submitted by such owners. It is no secret that Copyright Office resources are lacking, which, in turn, can lead to significant processing delays. Indeed, according to the Copyright Office, registration materials sent by mail can take up to 28 months to complete. *See* U.S. Copyright Office, "Registration Processing Times," https://www.copyright.gov/registration/docs/processingtimes-faqs.pdf. Web and email claims fare little better, taking up to 16 months. *Id.* For a struggling writer, photographer or other creator, losing out on the ability to enjoin an infringer for 16 or even 28 months would be a significant injury.

The Copyright Office advises that "processing times vary based on a number of factors, including how difficult a claim is to review, whether the

Copyright Office needs to correspond with an applicant, and the number of registration specialists available to review claims." *Id.* All of these factors are out of the control of the claimant. The "difficulty" of a claim can depend on factors included, but not limited to, the age of the work, whether the work has chain of title issues, and whether the work is part of a group registration.

A significant number of registrations get caught up in communications between the examining division and the registrant. According to one photographer, the entire cycle back and forth can take months, if not significantly longer.

For example, once a registrant submits all of the required registration materials, she may not hear back from the Copyright Office for many months, or even years. When she does hear back, the communication might be a question relating to the registration, or the materials contained therein. Once supplemental materials are submitted to the Copyright Office in response to the query, it can take many additional months to even hear back from the Copyright Office again.

Indeed, the delays in many cases are due to reasons that the drafters of the statute could never have contemplated, and the delays are unjustified when their consequences are weighed. For example, one member of *amici* calculated that the average time it took for the Copyright Office to process each

of her 276 registrations was 297 days. Those 297 days represent the amount of time an infringer could have exploited this creator's work without her being able to enjoin infringement, time that she lost from the three-year statute of limitations for infringement, and more days than the grace period Section 412 allows.

The vagaries of the normal process of registration, under Respondents' reading, would force every author to use what the Copyright Office intended to be an optional expedited registration process. *See* Policy Decision Announcing Fee for Special Handling of Applications for Copyright Registration, 47 Fed. Reg. 19,254, 19,254 (May 4, 1982). As an initial matter, the fee, $800, is many times higher than that of a "normal" registration, and is prohibitively expensive for many authors, especially those who create and must register multiple works in any given period due to the nature of their medium (*e.g.*, photography, weblogs). While Respondents suggest that such a fee is low, *see* Brief of Respondents-Appellees at 7, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707 (2018) (No. 17-571), considering that even full-time writers average $17,500 a year, this sum cannot be taken for granted for *amici* and other creators. Moreover, the process of filing an expedited registration can be as difficult as the garden variety registration.

Respondents claim "[t]he $800 special handling fee, however, is a pittance compared to the cost of litigating a copyright action in federal court." *Id.* But that is not a reason to saddle authors with an additional $800 they can ill afford. Indeed, the fact that federal copyright litigation generally costs far more than the value of any given infringement – and prevents many authors from bringing suit – is why *amici* support legislation to create a Small Copyright Claims tribunal as proposed in a bill introduced in the House of Representatives on October 4, 2017. The bill would provide an alternative forum for lower-value copyright claims, with a total cap on liability of $30,000 in any one proceeding. There also would be no fee-shifting; the parties would bear their own costs, and representation by a lawyer would not be necessary.

Another factor Respondents do not consider when characterizing $800 as a "pittance," is the number of expedited registrations some creators need to file for certain works. While there are many authors who may take long periods of time to create single works, photographers can take thousands of photographs in a day. For example, a photographer may take between 1,500 to 5,000 photographs at a single photo shoot, yet only receive $250 as payment for taking the photographs.

This day rate is already less than the cost of one expedited registration. But if a photographer

discovers that an infringer has used more than one of her unregistered photographs taken in different years, she would be forced to pay $800 per expedited registration, more than she was paid to take the photographs in the first place.

B. Authors Risk Losing the Indispensable Deterrents to Infringements: Statutory Damages and Attorneys' Fees.

Creating an obstacle to recovery of statutory damages and attorneys' fees – which are indispensable deterrents against infringers – would blunt or remove the most effective arrows in a wronged author's quiver. 17 U.S.C. §§ 504-05. *See F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 232 (1952); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352-53 (1998) ("an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment"); *Bryant v. Media Right Prods.*, 603 F.3d 135, 144 (2d Cir. 2010) (in calculating statutory damages awards courts should consider, *inter alia*, "the deterrent effect on the infringer and third parties").

Based on rules of statutory construction that similar language should be read uniformly in related sections of a statute, there is a risk that – should this Court affirm the Eleventh Circuit's decision in holding that Section 411 requires the Copyright Office to have issued a registration certificate – the

interpretation of Section 412 could be impacted as well.

Because it is the rare instance when a registration decision is made by the Copyright Office within three months of being filed, and the highest demand, and thus the appearance of piracy, generally occurs immediately after a work is released to the public, most works will be infringed before a registration issues – due to no fault of the author. Yet, such authors, like *amici*, would lose millions in statutory damages, as well as attorneys' fees. Moreover, as described above, the removal of attorneys' fees for infringements in this crucial post-publication time period would effectively close the courthouse doors for many authors and creators.

In *F.W. Woolworth Co.*, the Supreme Court discussed the policy underpinning statutory damages, stating:

> [A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful

> conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within the statutory limits to sanction and vindicate the statutory policy.

344 U.S. at 233, 73 S.Ct. 222. *See also Broad. Music, Inc. v. Prana Hosp., Inc.*, 158 F. Supp. 3d 184, 200 (S.D.N.Y. 2016) (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n. 19 (1994)) (explaining that a court may consider, *inter alia*, considerations of deterrence in awarding attorneys' fees); *Broad. Music, Inc. v. R Bar of Manhattan, Inc.*, 919 F. Supp. 656, 661 (S.D.N.Y. 1996) (awarding attorneys' fees to the prevailing parties after considering need for deterrence). In many cases, such damages and fees are the only factors that make a lawsuit even remotely cost-effective for authors. *See Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 609-10 (7th Cir. 2002) ("willful infringements involving small amounts of money cannot be adequately deterred . . . without an award of attorneys' fees").

C. The Statute of Limitations and Copyright Office Processing Times Could Create a Risk of Authors Losing the Right to Enforce Copyright Rights Completely.

An even harsher result for authors could come from the application of the three-year statute of limitations in cases where the registration process by the Copyright Office consumes much of the three-year period allotted. 17 U.S.C. § 507. While Congress intended for authors to have three years to investigate claims, prepare lawsuits, and perhaps to negotiate, in cases like that of Petitioner, that statute of limitations could be cut in half. *See Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 620-21 (9th Cir. 2010).

D. Injunctive Relief Could Be Unavailable During the Most Crucial Period of Publication.

Under the Eleventh Circuit's reading of the Act, other remedies, such as a temporary restraining order or a preliminary injunction, could be unavailable to authors who are waiting on the Copyright Office's action. 17 U.S.C. § 502. *See La Resolana*, 416 F.3d at 1204 ("Every remedy outlined in Title 17, including injunctions, is conditioned upon a copyright owner having registered the copyright.").

Such a delay in the availability of injunctive relief under 17 U.S.C. § 502 would harm authors. Historically, courts have been wary that failure to grant such relief, including on a preliminary basis, could create a *de facto* compulsory license to permit an infringer to continue to use copyrighted works and pay damages instead of ending infringing conduct altogether. This reasoning is rooted in the view that a copyright owner's exclusive rights by definition depend on the right to exclude, and that money damages are generally insufficient to compensate a copyright owner for harm caused by infringement. Forcing an author to watch without recourse while her work is infringed for months while awaiting the Copyright Office's action on a registration ignores the non-monetary dimension of the harms inherent in copyright infringement. Courts recognize that such harms include reputational damage to the author, damage to the author's relationships with legitimate copyright distributors, and that lost sales and profits are often difficult to calculate for monetary relief. *See, e.g., Am. Broad. Cos., Inc. v. AEREO, Inc.*, 874 F. Supp. 2d 373, 397-98 (S.D.N.Y. 2012)), *aff'd sub nom.*, 712 F.3d 676 (2d Cir. 2013), *rev'd and remanded on other grounds sub nom.*, 134 S. Ct. 2498 (2014) (damage to the plaintiff's ability to negotiate with advertisers because of a competitor's effect on ratings); *Warner Bros. Entm't Inc., v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1012 (C.D. Cal. 2011) (interference with

exclusive license agreements); *Getty Images (US), Inc. v. Virtual Clinics*, 2014 WL 1116775, at *6 (W.D. Wash. Mar. 20, 2014). As with monetary damages, delaying an author's vindication of her right to exclude others from use is especially damaging where the bulk of the public's interest is concentrated. *See, e.g., Hounddog Prods., L.L.C. v. Empire Film Grp., Inc.*, 826 F. Supp. 2d 619, 632-33 (S.D.N.Y. 2011).

Injunctive relief has come to the forefront for combatting infringement in the Internet age. Often, third party Internet providers, such as domain name registrars and content delivery networks that power and host anonymous scofflaw websites, are the only entities within the power of any court. These actors can only be reached by enforcing injunctions issued against the primary actors against them as well. *See, e.g., Arista Records, LLC v. Tkach*, 122 F. Supp. 3d 32, 39 (S.D.N.Y. 2015).

Respondents' view would ensure that willful infringers of otherwise timely-registered works could act with impunity without threat of injunctive relief during the most valuable part of a newly published work's sales cycle. Where such infringers were online, they could simply disappear before the Copyright Office finished processing the appropriate

registrations, having skimmed the cream from the work.[5]

III. WAITING ON ACTION FROM THE COPYRIGHT OFFICE IS NOT JUDICIALLY EFFICIENT.

By reversing the Eleventh Circuit's Order, and adopting the approach espoused by Petitioner, Nimmer, and the *amici*, this Court will cause federal courts to avoid unnecessary judicial labor and waste of resources.

Many courts adopting the "registrant" approach have recognized that "construing the statute this way leads to an inefficient and peculiar result[,]" as it "makes little sense to dismiss a case (which will likely be refiled in a matter of weeks or months) simply because the Copyright Office has not made a prompt decision that will have no substantive impact on whether or not a litigant can ultimately proceed." *Cosmetic Ideas, Inc.*, 606 F.3d at 620. *See also Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 366 (5th Cir. 2004) *abrogated by*

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[5] As troubling as the delay for authors is the fact that infringers would be able to weaponize the infringement process by filing declaratory judgment actions during the period when authors could be blocked from bringing a counterclaim. This would not serve the law's objective to encourage timely registration because such a tactic could be employed even where the rights owner made immediate registration but was not yet issued a certificate.

Reed Elsevier, 559 U.S. at 154 ("technicalities should not prevent litigants from having their cases heard on the merits").

Moreover, to wait for the Copyright Office to issue a registration certificate would be putting form over substance. 97% of all claims are granted by the Copyright Office, and suits can be brought after such rejection. *See* 2009 Annual Report at 4. *See also Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1301 (11th Cir. 2012) (quoting *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1142 (11th Cir. 2007)) ("[R]egistration (or a refusal of registration) of a United States work 'is a prerequisite for bringing an action for copyright infringement[.]'").

Finally, adopting the "registrant" approach will not lead to a greater burden on the judiciary. Circuits that have adopted the approach supported by *amici* have not seen a flood of meritless suits for registrations that are denied by the Copyright Office. *See Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir. 1984); *Cosmetic Ideas*, 606 F.3d at 620-21. District courts that have followed suit similarly have not seen a deluge of meritless suits. *See, e.g., Wilson v. Mr. Tee's*, 855 F. Supp. 679, 682-83 (D.N.J. 1994); *Tang v. Hwang*, 799 F. Supp. 499, 502-03 (E.D. Pa. 1992); *SportsMEDIA Tech. Corp. v. Upchurch*, 839 F. Supp. 8 (D. Del. 1993); *Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004); *Tri-Marketing v. Mainstream Mktg. Servs., Inc.*, No. 09 Civ. 09-13 (DWF) (RLE), 2009 WL 1408741 (D. Minn. May 19, 2009).

CONCLUSION

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted.

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APPENDIX

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This amicus brief is joined by the following artists' rights organizations:

APA. American Photographic Artists ("APA") is a trade association of more than 2,000 photographic professionals who promote professional practices, standards, and ethics in the photographic community.

ASMP. American Society of Media Photographers, Inc. ("ASMP") represents the interests of professional photographers whose photographs are created for publication and has approximately 7,000 members. It is the oldest and largest organization of its kind in the world.

GAG. Graphic Artists Guild ("GAG") is a national union of graphic artists dedicated to promoting and protecting the social, economic and professional interests of its members. GAG's members include graphic designers, web designers, digital artists, illustrators, cartoonists, animators, art directors, surface designers, and various combinations of these disciplines.

The Guild. The Dramatists Guild of America (the "Guild") is the only professional organization

promoting the interests of playwrights, composers, lyricists, and librettists writing for the stage. Established over eighty years ago for the purpose of aiding dramatists in protecting both the artistic and economic integrity of their work, the Guild continues to educate, and advocate on behalf of, its over 6,000 members. The Guild believes a vibrant, vital theater is an essential element of this country's ongoing cultural debate, and seeks to protect those individuals who write for the theater to ensure its continued success.

HWA. The Horror Writers Association ("HWA") is a non-profit organization dedicated to promoting and educating the public on the horror genre, as well as offering assistance and resources to writers within the genre. Founded in 1985, the organization has grown from a handful of influential writers to over 1,500 members in 27 countries. HWA also sponsors the annual Bram Stoker Awards for superior achievement in horror and dark fantasy, and hosts StokerCon each year, as well. For more information, please visit www.horror.org.

NANPA. North American Nature Photography Association ("NANPA") is a trade organization with approximately 2,300 members involved in all aspects of nature photography.

NASW. In 1934, a dozen pioneering science reporters established the National Association of Science Writers ("NASW"), at a meeting in New York.

They wanted a forum in which to join forces to improve their craft and encourage conditions that promote good science writing. The association was formally incorporated in 1955 with a charter to "foster the dissemination of accurate information regarding science through all media normally devoted to informing the public." Over the years, its officers have included both freelancers and employees of most of the major newspapers, wire services, magazines, and broadcast outlets in the country. Today, NASW has 2,290 members and 301 students. Above all, NASW fights for the free flow of science news.

NPPA. The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

PPA. The Professional Photographers of America ("PPA") is the largest and longest-standing nonprofit photography trade association with a 150-year history. It currently helps 30,000-plus professionals elevate their craft and grow their businesses with resources, protection, and education, all under PPA's core guiding principle of closing the gap between what photographers do as artists and entrepreneurs and what consumers want.

SFWA. Science Fiction and Fantasy Writers of America ("SFWA") is the national organization for professional authors of science fiction, fantasy, and related genres. Founded in 1965, SFWA is a non-governmental, California 501(c)(3) not for profit member organization. SFWA informs, supports, promotes, defends, and advocates for its 1,900 members, the majority of whom are professional freelance authors of novels and/or short fiction who have met the criteria for active membership: paid publication of one long or three short works meeting the organization's professional standards.

SGA. The Songwriters Guild of America ("SGA") is the nation's oldest and largest organization run exclusively by and for songwriters, with more than 5,000 members nationwide and over seventy-five years advocating for songwriters' rights. It is a voluntary association of songwriters, composers, and the estates of deceased members. SGA provides a variety of services to members, including contract

advice, copyright renewal and termination filings, and royalty collection and auditing to ensure that members receive proper compensation for their creative efforts. SGA's efforts on behalf of all U.S. songwriters include advocacy before regulatory agencies and Congress, and participating as amicus in litigation of significance to the creators of the American canon of popular music.

TAA. The Textbook & Academic Authors Association ("TAA") is the only nonprofit membership association dedicated solely to assisting authors of scholarly books, textbooks, and journal articles. Formed in 1987, the TAA has over 2,000 members, primarily consisting of authors or aspiring authors of scholarly books, textbooks, and academic articles. Many of the TAA's members serve on college or university faculties. TAA's mission is to support textbook and academic authors in the creation of top-quality educational and scholarly works that stimulate the love of learning and foster the pursuit of knowledge. TAA's activities including: organizing writing workshops on campuses throughout the United States; holding an Annual Authoring Conference; publishing a newsletter; running webinars; and maintaining a website and other resources to provide members with information on tax, copyright, and royalty matters. TAA also works to foster greater public appreciation of the importance of scholarly authors to education and to the advancement of knowledge.